ORIGINAL

No. 84-1077

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

HAROL WHITLEY, et.al.,
Petitioners,

v.

GERALD ALBERS,
Respondent

Respondent's Brief in Opposition to
Petition for a Writ of Certiorari

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STATEMENT OF THE CASE

Petitioner's summary of the facts and procedural history is for the most part accurate. However, there are some misstatements and omissions which are noteworthy.

First, contrary to the thrust of petitioner's brief, this case involves more than the issue of whether the general use of firearms by guards was necessary. Even assuming that the prison officials did not violate the Eighth Amendment by storming the cellblock with shotguns rather than using less drastic options for resolving the disturbance, sufficient evidence was introduced to allow a jury to find that there was no need whatsoever to direct any gunshot at Albers. By the time the assault squad entered the cellblock, the level of the disturbance had subsided, with Klenk being the sole protagonist. There was no reason to shoot indiscriminately at others, particularly Albers who was clearly not involved in the disturbance.

Petitioners mischaracterized this case as involving "a controversy over whether prison administrators, confronted with a serious prison riot and imminent risk of loss of life of inmates and guards, made an inaccurate assessment of how best to defuse that threat and regain control of a cellblock". (Petition pages 6-7). When the armed guards stormed the cellblock, there was neither a serious prison riot occurring, nor an imminent risk of loss of life of inmates and guards. As such, a disabling action to Klenk alone would have regained order without any physical harm to guards or other inmates. Unfortunately, the prison officials decided to take the "shotgun approach", amounting to a deliberate indifference to the physical safety of innocent persons.

Second, petitioners have ignored the evidence that the armed guards entering the cellblock were not told to and did not give inmates verbal commands or warnings before shooting at them. The stairway to the second tier was Albers' only route for returning to his cell. Yet, neither Kennecott nor any other guard instructed Albers to remain away from the stairway or gave a command such as "stop or I'll shoot". Even the State's expert witness, Roger Christ agreed that, given enough time, the guard should have yelled, "stop, lie down, stay where you are" if officers did not want inmates heading up the stairs. A jury could have found that the prison officials' approach in resolving the disturbance was "hopelessly flawed", at least to the extent that it placed Albers in a position where serious physical injury was unavoidable. The trial court usurped the jury's function by resolving contradictions in evidence and passing upon the credibility of witnesses. Albers v. Whitley, 743 F2d 1372, 1375 (9th Cir. 1984).

A WRIT OF CERTIORARI SHOULD NOT BE ALLOWED

I. This case presents none of the special and important reasons for which the Court should grant a Writ of Certiorari under Rule 17. The Ninth Circuit decision is not in conflict with a decision of another Federal Court of Appeals or State Court. Moreover, the lower court has decided neither an important question of federal law which has not been but should be settled by this Court nor a federal question in a way in conflict with applicable decisions of this Court. Rather, the Ninth Circuit decision applies the Eighth Amendment's proscription against cruel and unusual punishment in conformity with the rulings of this Court and lower federal and state courts which

have spoken on this constitutional principle.

The Ninth Circuit understood that prison officials must be given considerable latitude in dealing with a crisis or other institutional need. However, in ruling as it did, the lower court paid respect to the teaching that "[t]here is no iron curtain drawn between the Constitution and prisons of this country". Wolff v. McDonnell, 418 US 539, 555-556 (1974); Bell v. Wolfish, 441 US 520, 545 (1979).

With these principles in mind, the Ninth Circuit stated:

> "`Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry' Bell v. Wolfish. . . Moreover those authorities must be allowed a reasonable latitude for the exercise of discretion in determining the appropriate response to a crisis. . .
>
> On the other hand, the latitude accorded to prison authorities does not mean they are authorized to use any amount of force, however great. Ridley v. Leavitt, 631 F2d 358, 360 (4th Cir 1980). In our view a proper standard deems that Eighth Amendment to have been violated when the force used is `so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time.' Jones v. Mabry, 723 F2d 590, 596 (8th Cir 1983), cert. denied, ____ US ____ . . . Thus if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary, Albers' constitutional right would have been infringed. Similarly, if the emergency plan was adopted or carried out with `deliberate indifference' to the right of Albers to be free of cruel unusual punishment, then the eighth amendment has been violated." [citations omitted].

Albers v. Whitley, supra, at 1375.

The Ninth Circuit adopted those established interpretations of the Eighth Amendment which have application to the circumstances presented in this case. It then concluded, as an evidentiary matter, that Albers presented sufficient evidence to

allow a jury to find that his constitutional rights had been violated. The Ninth Circuit merely held that the trial court should not have directed a verdict against Albers and that the jury should have been given the opportunity to decide whether the force used against him was unnecessary, unreasonable, and grossly excessive under the circumstances presented by this particular case.

In essence, petitioners argue that an inmate's Eighth Amendment rights should fall to the wayside during the course of "riot". There is no basis for the proposition that prison officials are immune from liability, under the Constitution, for the use of excessive and unnecessary force during a "riot". Petitioners seem to be seeking the same immunity under federal law as it has under Oregon law. [1]

Petitioners argue that Ninth Circuit opinion has improperly grafted a tort standard onto the Eighth Amendment. (Petition, page 11) This argument ignores the Ninth Circuit's explicit direction that "it is not enough for Albers to show that he may have been the victim of a state law tort; he must show a violation of the Constitution or federal statute" Albers v. Whitley, supra, at 1374. As stated by the lower court, the Constitution is violated when the state manifests deliberate indifference to plaintiff's rights to be free of cruel and unusual punishment which, in the present case, arises when there occurs unjustified infliction of bodily harm upon a prisoner by or

[1] ORS 30.265(3)(e) provides prison officials with immunity from liability for "any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of the foregoing". Albers' complaint included a pendent state claim under the state tort claims act, which the District Court dismissed based upon ORS 30.265(3)(e). The Ninth Circuit upheld the dismissal of the pendent state claim.

within the authority of state officials, Id.; Miller v. Solem, 728 F2d 1020 (8th Cir. 1984); Haygood v. Younger, 718 F2d 1472 (9th Cir. 1983); King v. Blankenship, 636 F2d 70 (4th Cir. 1980).

To be sure, there can be some overlap between common law tort and constitutional analysis. For example, Burton v. Waller, 502 F2d 1261 (5th Cir. 1974), cited by petitioners (Petition, page 10), involved a claim under 42 USC Section 1983 for damages arising from fatalities and injuries from gunfire used by police during a student demonstration. The Fifth Circuit held that the police could use common law tort defenses against the substantial constitutional claim promoted by the students.

Petitioners erroneously imply that the students in Burton were limited to a common law tort rather than a constitutional remedy. Similarly, in their hypothetical reference, petitioners wrongly assert that the persons who took control of the nuclear power plant, would be restricted to a state tortious assault and battery claim (Petition, page 10). These persons may very well have a remedy under the Due Process Clause if police shoot them unnecessarily, in light of the particular circumstances.

In any event, persons demonstrating on a college campus or at a nuclear power plant are not within the absolute control and custody of law enforcement personnel. On the other hand, prisoners' well-being and personal safety is dependent, every day and every hour of each day, totally on the actions of corrections officers.

Accordingly, the Ninth Circuit properly applied this Court's decision in Estelle v. Gamble, 429 US 97 (1976) to this case. The Court, in Estelle, was concerned about denial of medical care

resulting in pain and suffering which does not serve any penological purpose.

> "The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying common law view that `[i]t is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.'
>
> We therefore conclude that the deliberate indifference to serious medical needs of prisoners constitutes the `unnecessary and wanton infliction of pain' [citation omitted] proscribed by the eighth amendment. This is true whether the indifference is manifested by prison doctors in their response to prisoners' needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed . . . Id., at 103-104. [emphasis added]

Thus petitioners are wrong in stating that Estelle did not involve intentional action (Petition at page 13). Petitioners are also mistaken in seeking to distinguish this case from Estelle by asserting at page 13 of its petition

> "In a prison riot setting, where there is no dispute that remedial action should have been taken, and the only disagreement is whether the degree of force used was proportionate to the perceived danger, the cruel and unusual punishment clause has no application. In that setting, the Eighth Amendment is triggered only where the force is wholly without penological purpose.'"

Petitioners have provided no support for this position. Even "prison riots" must be viewed individually. If evidence shows that a riot could have been resolved by temporarily inconveniencing inmates through use of tear gas for example but, instead, prison officials shot firearms indiscriminately at inmates causing death or serious injury, it would be hard to see any penological purpose in the officials' actions. More specifically, the issue in this case is not solely whether petitioners had a penological purpose in using shotguns as a general matter. Rather, the real question is whether it was necessary, from a penological perspective, to shoot Albers.

Petitioners are exaggerating the extent to which the Ninth Circuit reasoning would interfere with its response to prison distrubance. A "well intentioned" false step would not subject officials to liability. On the other hand, if that false step is precipitated by "deliberate indifference" to the physical well-being of prisoners, liability may result.

The issue correctly decided by the Ninth Circuit was whether, in fact, Albers had presented enough evidence to allow a jury to decide whether petitioners had employed unnecessary force under the circumstances presented by this case. Albers suffered permanent nerve damage to his left leg and residual paralysis. Even in the context of a "riot" the Eighth Amendment would not allow prison officials to subject an inmate to such serious physical injury unless it was necessary.

The Ninth Circuit decision establishes no new Eighth Amendment principles. The lower court did nothing more than allow Albers the opportunity to present his facts to a jury and have it determine whether, based upon established Eighth Amendment standards, petitioners met their constitutional duty to him. The fact that a "riot" had taken place in the cellblock is important and gives petitioners a handle to argue that they acted reasonably in shooting at Albers. However, the ultimate decision on liability should be left to a jury.

II. The petitioner claims that the lower court has made a

qualified immunity defense unavailable to them. (Petitioner's petition, page 19). The Ninth Circuit said that if a jury was to find that the defendants' actions were undertaken with deliberate indifference to Albers' rights, they could not then avail themselves of a claim that their actions were undertaken with good faith. In reality, a qualified immunity defense is available in that a finding of "deliberate indifference" must implicitly include a finding that "good faith" was absent. "Good faith" is inconsistent with "deliberate indifference". See, Miller v. Solem, supra; Haygood v. Younger, supra; Whisenant v. Yuam, 739 F2d 160 (4th Cir. 1984); Llaguno v. Mingey, 739 F2d 1186 (7th Cir. 1984).

Petitioner argues that the Ninth Circuit's analysis of the qualified immunity issue is flawed because Albers' constitutional right was not clearly established at the time of the events in questions. Yet there can be no doubt but that, at the time the events here took place (June 27, 1980), the law was clearly established that prison officials may not use excessive or unnecessary force against prisoners. See, e.g., Spain v Procunier, 600 F2d 189, 195 (9th Cir. 1979), appeal after remand, sub nom, Spain v. Maintanos. 690 F2d 742 (1982); Little v. Walker, 552 F2d 193 (7th Cir. 1977) cert. denied 435 U.S. 932 (1977); Arroyo v. Schaeffer, 548 F2d 47 (2nd Cir. 1977); Greear v. Loving, 538 F2d 578 (4th Cir. 1976); Bruce v. Wade, 537 F2d 850, 853 (5th Cir. 1976); Johnson v. Glick, 487 F2d 1028 (2nd Cir. 1973), cert. denied 414 U.S. 1033 (1973); Howell v. Cataldi, 464 F2d 272, 282 (3rd Cir. 1972); McCargo v. Meister, 462 F.Supp 813 (D. Md 1978); Beishir v. Swenson, 331 F.Supp 1227 (W.D. Mo. 1971).

That none of the foregoing cases involves a prison riot and hostage rescue situation does not defeat their adequacy as precedent that unnecessary force would be unconstitutional. The immunity defense fails when a clearly established constitutional right is violated. Harlow v. Fitzgerald, 457 US 800 (1982). The settled law for purposes of the qualified immunity test may be established not only by U.S. Supreme Court decisions, but by reference to opinions of courts of appeals or local federal district courts. Procunier v. Navarette, 434 US 555, at 565-66 (1978).

In Picha v. Wielgos, 410 F.Supp 1214, 1219 (N.D. Ill. 1976), the court rejected an overly technical view of what constitutes adequate precedent to alert an official to the fact that conduct would be unconstitutional. The court said:

> "...In terms of the policies set forth in Wood [Wood v. Strickland, 420 US 308 (1975)], it appears that law can be settled without there having been a specific case with identical facts which was decided inversely to the school officials. There is a limitation to the notion that school officials can have one "free" constitutional violation before they are liable for ignoring constitutional rights that arise in each unique factual setting."

Even though the court in that case found that the factual situation was novel, it held that the law which should have been applied to it was clear. Thus, the court declined to instruct the jury on any good faith immunity.

A similar conclusion was reached in Little v. Walker, supra, wherein the court held that defendant

> "Cannot hide behind a claim that the particular factual tableau on question has never appeared in haec verba in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconsti-

tutionality, a prison official may not take solace in ostrichism."

There can be no dispute that petitioners "knew or should have known" that prison officials may not use excessive or unnecessary force against prisoners. Significantly, the Correction Division's Rule Governing Process for Use of Physical Force, Weapons, Chemical Agents and/or Restraints," states that "only the minimum degree of physical force which is necessary on any particular occasion will be used."

CONCLUSION

The Ninth Circuit applied accepted Eighth Amendment standards in reversing the District Court's directed verdict against respondent. Its decision merely allows a jury to determine whether the facts of this specific case show that petitioners were deliberately indifferent to respondent's physical well-being, by unnecessarily using firearms against him. As long as prison officials act with good intentions and do not ignore the safety of the prisoners under their control, they need not fear liability for damages under 42 USC Section 1983.

There is no reason for the Court to review this case, which merely presents an isolated instance in which excessive force was allegedly employed. This is not a suit challenging some system wide prison policy or practice. Should a jury eventually find in respondent's favor, there is no reason to believe that the verdict would have application beyond the circumstances of this specific case.

Respectfully Submitted,
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